



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
ACQUISITION AND GRANTS OFFICE

APR 04 2019

Mr. Joshua Spence
Chief Technology Officer
Executive Office of the State of West Virginia
1900 Kanawha Boulevard, East
Building 1, Room EB-80
Charleston, WV 25305-009

Anthony Martin, Esq.
Chief Deputy Attorney
General State of West Virginia
Office of the Attorney General
State Capitol
Building 1, Room 26-E
Charleston, WV 25305-0220

Re: Executive Office of the State of West Virginia Appeal of Investigation Resolution Determination Letter Concerning of Denial and Demand for Repayment of \$4,705,000 Related to NTIA BTOP Award No. NT10BIX5570031

Dear Mr. Spence and Mr. Martin:

The National Oceanic and Atmospheric Administration (NOAA), on behalf of the National Telecommunications and Information Administration (NTIA), has completed its review of the appeal of the collection notification submitted by the Executive Office of the State of West Virginia (EOWV). EOWV appeals the \$4,705,000 debt established by NOAA against EOWV pursuant to the Investigation Resolution Determination Letter (IRDL), dated August 21, 2017.

For the reasons set forth in the attached Appeal Resolution, NOAA has determined the EOWV has not provided a sufficient basis to warrant a reduction to the total amount of Federal award funds required to be returned to the Department. Accordingly, the \$4,705,000 debt established by the Bill for Collection dated November 17, 2017, remains in full force and effect, with no adjustments being made as a result of EOWV's appeal. The National Institute for Standards and Technology (NIST) will resume collection activities relative to the subject debt as provided in the Bill for Collection.¹ This letter, including attachments, constitutes a final agency decision and the conclusion of the Department of Commerce (DOC) administrative appeal processes available to EOWV.

¹ NOAA is responsible for grants administration, and NIST serves as financial agent for debt collection activities.

Debt and Demand for Payment

On November 17, 2017, NIST, on behalf of NTIA, established a \$4,705,000 debt and sent EOWV a Bill for Collection with a due date of December 17, 2017. The debt included a principal amount of \$4,705,000, plus interest thereon at a fixed rate of 1% per annum. The Department is waiving interest and penalty charges on the amount of the adjusted debt for the period beginning thirty (30) business days after the appeal was filed through the date of this letter. Hence, demand is hereby made for immediate and full payment of \$4,705,000, plus applicable administrative and penalty fees within 30 calendar days of the date of this letter. The amount demanded should be paid in one lump sum by the due date in accordance with the terms of this letter.

The Department is aware of the pending *qui tam* litigation initiated by CityNet LLC from which the Government declined to intervene. However, this litigation does not foreclose the Department's ability to seek repayment of disallowed costs from BTOP Award No. NT10BIX5570031 as an administrative matter. Nor does the litigation relieve EOWV as the recipient of the BTOP award of liability for the debt.

In accordance with the enclosed invoice, the full payment of the principal balance should be made by a check payable to NIST.² On the check, please reference award number NT10BIX5570031 and invoice number #880942.

Payment along with a copy of the invoice must be sent to:

NIST
100 Bureau Drive, STOP 1624
Gaithersburg, MD 20899-1624

EOWV's failure to pay the debt in full or to negotiate an installment payment plan or other arrangement acceptable in form and substance to NIST may result in payments being withheld under any current NTIA or DOC awards to it and in the suspension or termination of such awards. In addition, EOWV will become ineligible for Federal loans (except disaster loans), loan insurance or guaranties. Also, it is U.S. Department of Commerce Policy that no new award of Federal funds shall be made to a grant or cooperative agreement applicant who has an outstanding delinquent debt to DOC. See 15 C.F.R. § 19.17.

Collection Actions

NIST, on behalf of NTIA, is entitled to take all appropriate steps to collect delinquent debts and will do so in this case if the debt is not paid as demanded above. These steps may include:

- ☐ referring the debt to the U.S. Department of the Treasury for offset of EOWV income tax refunds, contractor/vendor payments and any other Federal payments, including but not limited to, certain benefit payments and loans, that are not exempt from offset;
- ☐ referring the debt to a private collection agency;

² Please note that interest, penalties, and administrative fees will start accruing 30 days from the date of this letter.

- ☐ reporting the debt to a credit bureau;
- ☐ referring the debt to the U.S. Department of Justice for litigation;
- ☐ reporting the debt, if discharged, to the Internal Revenue Service as potential taxable income;
- ☐ referring the debt to the U.S. Department of the Treasury for any of the above described actions, which referral is required when the debt has been delinquent for 120 days; and
- ☐ performing administrative offset or common law set-off of the debt against any payments or credits that may be owed to EOWV by NIST.

The payment of this debt is entitled to priority treatment in accordance with 31 U.S.C. § 3713. Failure to satisfy NTIA's claims before paying the claims of other creditors may result in the personal liability of one or more of EOWV officers, employees or other representatives for this debt.

Inspection and Copying of Records

EOWV has the right to inspect and copy non-privileged records related to the debt. If EOWV wishes to inspect or copy such records, the NIST point of contact identified at the end of this letter will, upon request, explain the procedures for inspecting and copying official records.

Repayment Agreement

If EOWV is financially unable to pay the full amount of the debt, plus applicable penalties, interest and administrative charges, in one lump sum, EOWV may apply to enter into a written repayment agreement with NIST to repay the debt, including any interest, penalties and administrative charges imposed thereon. *See* 31 C.F.R. § 901.8(a). In such a case, EOWV must request a repayment agreement within 60 calendar days from the date of this letter. In addition, a repayment request submitted by EOWV must propose a specific repayment period not to exceed three years and must indicate the amount and frequency of the proposed debt payments. In this connection, the amount and frequency of the installment payments proposed by EOWV “should bear a reasonable relation to the size of the debt and the debtor’s ability to pay.” 31 C.F.R. § 901.8(b). Supporting documentation, if any, must be provided by EOWV with the request. Also, please note that the information and documentation submitted by EOWV will be used in lieu of the U.S. Department of Justice Form OBD-500C, Financial Statement of Corporate Debtor, which primarily applies to corporate debtors. This will generally be EOWV’s only opportunity to request a repayment agreement relative to the payment of the subject federal debt.

NIST and NTIA will review all information and materials submitted in a timely manner, as well as information obtained from other sources (*e.g.*, credit reports), and will issue a written decision to EOWV. *See generally* 31 C.F.R. parts 901 and 902.

An original and one copy of a request for a repayment agreement must be timely submitted to the

following NIST point of contact:

Julie Weiblinger
Accounts Receivable Group Manager, Office of Financial Management
National Institute of Standards and Technology
100 Bureau Drive, Mail Stop 1624
Gaithersburg, Maryland 20899-1624

Please direct any questions regarding this correspondence to Arlene Simpson Porter, Director, Grants Management Division, at (301) 628-1314 or arlene.s.porter@noaa.gov.

Sincerely,



Jeffrey S. Thomas
Director

cc: Douglas Kinkoph, NTIA Associate Administrator, OTIA
David Mullins, Acting State Finance Director

Attachments: Appeal Resolution
Bill for Collection, dated November 17, 2017

APPEAL RESOLUTION

NOAA and NTIA records that were reviewed in support of this Appeal Resolution are the Report of Investigation (ROI) issued by the Commerce Department's Office of Inspector General in June 2017, the Investigation Resolution Determination Letter (IRDL) issued by the NOAA Grants Office on August 21, 2017, the NOAA official award file, the Bill for Collection issued by NIST on November 17, 2017, the EOWV appeal letter received by NOAA on January 12, 2018, and, unless indicated otherwise below, letters, emails, and telephone conversations pertaining to this matter that were exchanged between EOWV, the NOAA Grants Office, and NTIA during the period of February 12, 2010, through January 12, 2018.

SCOPE OF APPEAL RESOLUTION

EOWV filed an appeal of the IRDL for the repayment of the disallowed costs associated with load processing fees and indirect cost charges (\$465,000 and \$4.24 million, respectively). In accordance with 15 C.F.R. Part 19 and the Department of Commerce Administrative Order 213-5, the scope of this Appeal Resolution is limited to the \$4,705,000 excess federal share that was disallowed by the NOAA Grants Office and for which NIST in the Bill for Collection demands repayment. The scope of this Appeal Resolution does not include questioned costs and other issues not within the subject matter of, or time covered by, the Bill for Collection.

FINAL DETERMINATION

EOWV's appeal is denied for the reasons stated below. In its appeal, EOWV offered several theories as to why the debt should not be enforceable. These theories are discussed in turn.

DISCUSSION

I. Claim: "The Agency Decision to Disallow and Demand \$465,000 Paid for Improper Fees Against the State Rather than Proceeding under the False Claims Act Against Frontier to Obtain the Funds and Treble Damages is Unwise, Arbitrary, and Capricious."

As set forth in the IRDL and ROI, Frontier West Virginia, Inc. (Frontier), a subrecipient of EOWV's grant award, billed and received payment for roughly \$465,000 in fees purportedly incurred in processing certain invoices. The OIG found that payment of these invoice fees was inappropriate because they were neither reasonable, allocable, nor supported by adequate documentation as required by the applicable rules and regulations. EOWV failed to provide information and documentation to refute the OIG's findings. NOAA and NTIA concluded that these fees were unallowable expenses and disallowed the entire \$465,000.

EOWV APPEAL

EOWV asserts that under the ROI's findings, the EOWV was unaware of the nature of the fees when it reimbursed Frontier, while Frontier knew that the fees were unallowable profit rather than allowable costs. Under such circumstances, EOWV argues, the Department of Commerce should have proceeded by intervening in the pending *qui tam* action against Frontier. Instead, EOWV notes, the Department issued an administrative disallowance and demand for repayment of the \$465,000 against EOWV, which according to EOWV, are inappropriate, arbitrary, and capricious actions. EOWV further complains that

it has been unjustifiably burdened by having to advance \$465,000 to the Federal government only to then expend litigation resources in the *qui tam* action to recover the same amount against Frontier. EOWV asks that the Department reconsider its approach to remedying Frontier's inappropriate receipt of the \$465,000 in fees for purported invoice costs.³

ANALYSIS AND CONCLUSION

While the Department of Commerce declined to intervene in the pending *qui tam* action against Frontier, it still may pursue action against EOWV under 15 C.F.R. Part 24, *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments* (Grant Rules). After a grant is closed out, a Federal agency may still exercise its right to disallow costs and recover funds based on a later audit or other review. *See* 15 C.F.R. § 24.51(a). In this instance, the Department of Commerce has decided to pursue its right to disallow and demand \$465,000 for the improper load processing fees against EOWV because NOAA and NTIA have a direct contractual relationship with EOWV as the recipient of the grant.

EOWV's argument that it was unaware of the nature of the fees when it reimbursed Frontier is immaterial here. Under the Grant Rules, EOWV, as the grantee, was "responsible for managing the day-to-day operations of grant and subgrant supported activities" and was required to "monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements." 15 C.F.R. § 24.40(a). Similarly, the Grant Rules required EOWV to "ensure that subgrantees [were] aware of requirements imposed upon them by Federal statute and regulation," which would have included cost principles. *Id.* § 24.37(a)(2); *see also id.* § 24.3 (defining subawardee as an entity "accountable to the grantee for the use of the funds provided" (emphasis added)).

The specific terms and conditions of the award at issue echoed these requirements. *See* BTOP Notice of Funding Availability (NOFA), Sec. C.5 ("Certifications") (requiring EOWV to certify that "any subawardees will comply with the terms, conditions, purposes, and federal requirements of the [BTOP] program"); DOC Standard Terms and Conditions, Sec. J.02 ("Applicability of Award Provisions to Subrecipients") ("The recipient shall require all subrecipients, including lower tier subrecipients, under the award to comply with the provisions of the award, including applicable cost principles, administrative, and audit requirements"); BTOP Recipient Handbook at 125. EOWV's failure to ensure Frontier's compliance resulted in the payment of unallowable costs, which the Department is entitled to recoup.

EOWV claims that it will now have to "advance" \$465,000 to the Federal government, only to then expend litigation resources against Frontier to recover the same amount. However, EOWV mischaracterizes the Department of Commerce's action, as it does not seek an "advance" but rather is acting wholly within its right to seek reimbursement from EOWV for disallowed costs for which it was accountable for under the award. Notwithstanding EOWV's assertions to the contrary, the fact that the EOWV chooses to, in turn, expend litigation resources against Frontier does not render the Department's actions as arbitrary.

Accordingly, the Department of Commerce declines to reconsider its approach to remedy Frontier's

³ In the IRDL, NOAA determined that the \$465,000 in invoice processing fees were unallowable costs because they were unreasonable, unallocable, and inadequately documented. IRDL at 2. EOWV does not appear to challenge this finding in its appeal.

inappropriate receipt of \$465,000 in fees for purported invoice costs.

II. Claim: “The Agency Decision to Disallow and Demand \$4.24 Million the State Reimbursed Frontier for Indirect Costs is Baseless, Unlawful, and Unreasonable.”

As set forth in the IRDL, Frontier billed and received payment for roughly \$4.24 million in fees related to loading charges. The OIG found that these fees were indirect costs and should have been disallowed under NTIA’s interpretations of the applicable grant rules. EOWV failed to provide information and documentation to refute the OIG’s findings. NOAA and NTIA have concluded that these fees were unallowable expenses and have thus disallowed the entire \$4.24 million.

A. Claim: “Statement of Relevant Facts”

EOWV APPEAL

In its “Statement of Relevant Facts,” EOWV asserts that the terms and conditions issued with its award neither disallowed indirect costs of subrecipients nor required specific procedures for EOWV to follow with respect to its subrecipient’s indirect costs. EOWV argues that, instead, the BTOP Recipient Handbook Version 2.0 allows recipients to work with subrecipients to implement their project and differentiates between a subrecipient and a recipient because NTIA has a direct relationship with the recipient. As such, EOWV concludes that “the terms of the relationship between recipients and subrecipients are not subject to federal oversight or prior approval.” EOWV also points out that several documents released by the Department of Commerce and NTIA did not contain specific guidance on indirect costs for subrecipients, including: the Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements, the General Indirect Cost Rate Program Guidelines for Grant Organizations, and several fact sheets. In addition, EOWV notes that an independent auditor conducted an audit to determine whether EOWV complied with the requirements for Federal awards pursuant to the Single Audit Act, and the auditor did not identify any noncompliance with respect to the reimbursement of subrecipient indirect costs. Similarly, EOWV notes that it had a conversation with an NTIA official about Frontier’s indirect costs, and the official said that it was not an issue.

ANALYSIS AND CONCLUSION

In accepting the BTOP grant, EOWV agreed to manage and administer its award as well as any awards to its subrecipients by adhering to the applicable regulations and terms and conditions, including 15 C.F.R. Part 24 – Uniform Administrative Requirements for States and Local Governments, the DOC Pre-Award Notification Requirements for Grants and Cooperative Agreements, and the DOC Financial Assistance Standard Terms and Conditions. Under the applicable regulations and terms and conditions, EOWV explicitly agreed that it would monitor and assure a subrecipient’s compliance with the terms and conditions of the award. 15 C.F.R. § 24.40(a) (requiring the recipient to “monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements”); *id.* § 24.37(a)(2) (requiring recipients to ensure that “subgrantees are aware of requirements imposed upon them by Federal statute and regulation”); BTOP Notice of Funding Availability (NOFA), Sec. C.5 (“Certifications”) (requiring EOWV to certify that “any subawardees will comply with the terms, conditions, purposes, and federal requirements of the [BTOP] program”); DOC Standard Terms and Conditions, Sec. J.02 (“Applicability of Award Provisions to Subrecipients”) (“The recipient shall

require all subrecipients, including lower tier subrecipients, under the award to comply with the provisions of the award, including applicable cost principles, administrative, and audit requirements”); BTOP Recipient Handbook at 125. In other words, the terms of the EOWV’s award would “flow down” to its subrecipients, including Frontier.

One of the agreed-to terms found in the Pre-Award Notification Requirements prohibited EOWV from charging indirect costs unless it “specifically included [the indirect costs] as a line item in the approved budget incorporated into the award.” 73 Fed. Reg. 7696, 7699 (Feb. 11, 2008) (Pre-Award Notification Requirements). Similarly, the Standard Terms and Conditions stated that “[i]ndirect costs will not be allowable charges against the award unless specifically included as a cost item in the approved budget incorporated into the award.” DOC Standard Terms and Conditions, Sec. A.05(a). Additionally, EOWV was prohibited from “transfer[ing] amounts budgeted for direct costs to the indirect costs line item or vice versa, without prior written approval of the Grants Officer.” 73 Fed. Reg. 7696, 7699; DOC Standard Terms and Conditions, Sec. A.04(c). The terms of the award did not differentiate between indirect costs for a recipient versus a subrecipient. Nor did the BTOP Recipient Handbook Version 2.0 describe any specific procedures for a subrecipient’s indirect costs, an unsurprising fact given that indirect costs were not generally allowed.

Notwithstanding these agreed-to terms, EOWV never submitted an approved budget to the Grants Office that included indirect costs as a line item. Nor did EOWV ever seek or receive approval from the Grants Officer to transfer amounts budgeted for direct costs to the indirect cost line item. Under such facts, EOWV was not allowed to charge any indirect costs to its award. Moreover, pursuant to the “flow down” requirements described above, EOWV was also responsible for ensuring that Frontier did not charge its indirect costs to the subaward unless Frontier specifically included those costs as a line item in the budget that EOWV approved and incorporated into Frontier’s subaward. There is no indication that Frontier ever submitted or that EOWV approved a budget that explicitly included the indirect costs as a line item. As such, EOWV failed to sufficiently monitor Frontier’s compliance with the grant terms and materially violated the grant terms by charging Frontier’s indirect costs to the grant award.⁴

The results of the independent audit have no bearing on this conclusion. At issue is not an auditor’s opinion on the integrity of EOWV’s financial statements or the adequacy of its financial management practices, but whether specific costs charged to the award are allowable under the grant’s terms and conditions. An independent audit is not a substitution for robust oversight conducted by the OIG, NTIA program officials, and the Grants Officer; nor does an independent audit change the rules, terms, and

⁴ EOWV and Frontier did sign a Memorandum of Understanding (MOU) on October 19, 2010 acknowledging that Frontier would “invoice EOWV for eligible costs under the Grant, as defined in the NOFA. [Frontier] may separately invoice EOWV for other costs that are not eligible under the Grant pursuant to the MPLS [, a separate contract between EOWV and Frontier]. EOWV agrees that any additional overhead costs incurred by [Frontier] as a result of being a sub-recipient of the Grant shall either be allowed as eligible costs under the Grant or under the MPLS Contract.” The following provision goes on: “[Frontier’s] cost estimates and invoices to EOWV will detail the specific work being done and the Grant Facilities for which reimbursement is requested, and may include an allocated share of additional overhead costs incurred by [Frontier] as a result of being a sub-recipient of the Grant.” While this MOU shows that EOWV approved of future invoices including indirect charges, it also allowed for such indirect charges to be paid for through a separate contract, MPLS. In any event, EOWV never submitted an approved budget from Frontier reflecting these indirect charges as a line item, a clear violation of its flow down requirements.

conditions to which a grantee must comply. In addition, EOWV's informal discussions with an NTIA official about Frontier's indirect costs is not determinative relative to the allowability of such costs. Rather, pursuant to the terms and conditions of the BTOP award, in order to be allowable, indirect costs must specifically be included as a cost line-item in the approved budget incorporated into the award, which itself must be approved in writing by the Grants Officer. *See* 73 Fed. Reg. 7696, 7699 (Feb. 11, 2008); DOC Standard Terms and Conditions, Sec. A.05(a). Any claimed miscommunication between EOWV and the NTIA official would not convert unallowable indirect costs into allowable costs, nor estop the Government in the recovery of the unallowed costs.

In sum, NTIA and the NOAA Grants Office independently reviewed the information provided by EOWV and other parties and determined that EOWV had materially failed to comply with the terms and conditions of its award when it charged Frontier's indirect costs to the award.

B. Claim: "Red Flags Warrant Careful Scrutiny of this Matter"

EOWV APPEAL

In EOWV's appeal, it argues that "the circumstances underlying the Grants Officer's decision call for attentive review and separate this from a usual case of a recipient dissatisfied with a disallowance decision." EOWV claims that the decision to demand that EOWV reimburse the unallowable costs was partly motivated by the fact that the OIG was under pressure to demonstrate a return on \$10 million that Congress appropriated for OIG's oversight of the BTOP program. EOWV further asserts that the IRDL does not address the purported issue that "the costs were direct costs as to the [EOWV] and Frontier is a subrecipient rather than a recipient of the grant." It also argues that this issue has not been considered with respect to any other recipient of Department of Commerce grants during the relevant period from 2010 to 2014, and as a result, EOWV is being treated differently by the Department than any other BTOP grantee.

ANALYSIS AND CONCLUSION

EOWV's claim that it is being singled out is unfounded. The OIG referred this matter to NTIA and NOAA for review and appropriate action when it issued its Investigative Report. Once NTIA and NOAA reviewed the findings in the report and received additional information from EOWV, the Grants Officer determined that the terms of the award did not permit payment of indirect costs not included in the budget and established a debt for the disallowed costs. The motives of the OIG in conducting its investigation or of the agency in reviewing those results are immaterial to whether the questioned costs are allowable under the award. Indeed, the Grants Officer's decision to disallow the costs and demand payment is supported by the Department of Commerce Financial Assistance Standard Terms and Conditions (DOC Standard Terms and Conditions), which has been incorporated into the BTOP Grant Award for EOWV. Chapter B.05 of the DOC Financial Assistance Standard Terms and Conditions states, "[f]ailure to comply with any or all of the provisions of the award....may be considered grounds for....establishment of an account receivable...." As noted previously, a Federal agency may disallow costs and recover funds based on an audit or other review. *See* 15 C.F.R. § 24.51(a).

EOWV is similarly wrong that the unallowable indirect costs incurred by Frontier should be treated as EOWV's allowable direct costs. Frontier's BTOP invoices reflect its indirect costs; the invoices explicitly state that "[l]oadings are allocated indirect costs such as vehicles, accounting, administration,

etc.” See ROI at 10. The terms of the award are clear that indirect costs are not allowed unless they are specifically included as a line item in the budget. See *discussion supra*; 73 Fed. Reg. 7696, 7699 (Feb. 11, 2008) (Pre-Award Notification Requirements); DOC Standard Terms and Conditions, Sec. A.05(a). Nowhere in the terms are indirect costs from a subrecipient treated differently from indirect costs from a recipient; therefore, the requirement to add indirect costs as a line item in the budget is equally applicable to both recipients and subrecipients alike. See e.g. 15 C.F.R. § 24.22 (applying allowable cost principles to Frontier as subrecipient). EOWV never submitted an approved budget to the Grants Office that included indirect costs as a line item. Nor did EOWV ever seek or receive approval from the Grants Officer to transfer amounts budgeted for direct costs to the indirect cost line item. Under such facts, EOWV was not allowed to charge any indirect costs to its award.

But even accepting EOWV’s argument that the costs at issue should be treated as its direct costs, EOWV still materially failed to comply with the terms of the award. More specifically, EOWV failed to abide by the “flow down” requirements under which EOWV was to ensure that Frontier did not charge its indirect costs to the subaward unless Frontier specifically included those costs as a line item in the budget that EOWV approved and incorporated into Frontier’s subaward. There is no indication that EOWV approved a budget from Frontier that explicitly included the indirect costs as a line item. In sum, EOWV failed to sufficiently monitor Frontier’s compliance with the grant terms and materially violated the grant terms by charging Frontier’s indirect costs to the grant award.

C. Claim: “The Grants Officer’s Implicit Interpretation of the Grant Requirements is Wrong”

EOWV APPEAL

In its appeal, EOWV asserts that the Department wrongly interpreted the prevailing grant rules in determining that the \$4.24 million in reimbursements for subrecipients’ indirect costs is not allowable. It argues that the general provision on indirect costs applies only to recipients, not contractors and subrecipients. Moreover, EOWV argues that the costs were in fact direct costs as to EOWV. Finally, EOWV notes that it never received “key ‘correspondence’ from unnamed NTIA personnel [to the OIG] outlining the purported ‘interpretation of the prevailing grant rules.’”

ANALYSIS AND CONCLUSION

Frontier’s BTOP invoices indisputably reflect indirect costs. See ROI at 10 (the invoices stated that “[l]oadings are allocated indirect costs such as vehicles, accounting, administration, etc”). EOWV did not provide any additional information during its appeal of the IRDL to support its claim that the loading fees were direct rather than indirect costs incurred by the recipient. Indirect costs are not permitted under this award unless specifically included as a line item in the budget (which they were not), and the recipient was not authorized to transfer funds budgeted for direct costs to indirect costs without prior written approval from the Grants Officer. See *supra* sec. II.A and II.B. As analyzed and explained above, Frontier’s \$4.24 million in loading charges were unallowable indirect costs as they were never reflected as a line item in the budget, either at the recipient or subrecipient level. See e.g., 15 C.F.R. § 24.22 (applying the principles on the allowability of costs to both the recipient as well as any subrecipient). Any correspondence between NTIA and OIG regarding NTIA’s interpretation of the grant rules would not alter the plain reading of the Grant Rules, terms, and conditions with respect to indirect costs.

D. Claim: “The Grants Officer Lacks Statutory Authority to Administratively Disallow and Demand Repayment of BTOP Funds”

EOWV APPEAL

In the appeal, EOWV asserts that the American Recovery and Reinvestment Act (ARRA) does not authorize the Grants Officer to administratively disallow and demand repayment for BTOP. EOWV contends that the only authority available to the Department would be the False Claims Act, which it asserts does not apply to EOWV because it acted in “good faith.”

ANALYSIS AND CONCLUSION

ARRA required that the Assistant Secretary of Commerce for Communications and Information “establish appropriate mechanisms to ensure appropriate use and compliance with all terms of any use of funds made available pursuant to [section 6001 which authorizes BTOP].” 47 U.S.C. § 1305(i)(3). To implement the program, NTIA entered into an agreement with NOAA through which the NOAA Acquisition and Grants Office (AGO) undertook grants management responsibilities for the program.⁵ Such responsibilities included, but were not limited to, decisions with respect to allowable costs and the demand for repayment of BTOP funds for disallowed costs. In addition, the Grants Officer acted pursuant to section 24.43(a) of the Grant Rules which, as its title states, provides “Remedies for noncompliance,” and states that “[i]f a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may . . . [d]isallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance.” 15 C.F.R. § 24.43(a). Moreover, pursuant to 31 U.S.C. § 3711(a)(1) the Department is charged “to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency,” which is done in accordance with those regulations governing Commerce Debt Collections promulgated at 15 C.F.R. part 19. Thus, the Department has acted within its statutory authority when it sought to obtain repayment of disallowed costs.

E. Claim: “Claims Against the State Regarding Reimbursement of Subrecipient Indirect Costs are Outside of the Applicable Statute of Limitations”

EOWV APPEAL

In its appeal, EOWV contends that the False Claims Act and its extended statute of limitations does not apply to this matter. As a result, it asserts that the general statute of limitations found in 28 U.S.C. § 1658(a) applies, and the Federal government is not entitled to the repayment of funds that EOWV disbursed to Frontier more than four years ago.

ANALYSIS AND CONCLUSION

The Department’s administrative process is not constrained by the statute of limitations for civil actions

⁵ Service Level Agreement between NOAA AGO and NTIA for the Purchase of Grants Office Services, Agreement No. M111055 (Dec. 2010) (providing that NOAA AGO would assume grants management responsibilities as described in Chapter 4, Section F, of the DOC Grants and Cooperative Agreements Interim Manual (dated Feb. 2002)).

found in 28 USC § 1658(a). Instead, the Department's demand for repayment of unallowable costs is consistent with the grant rules and terms and conditions of the grant award that EOWV knowingly accepted. More specifically, EOWV agreed that the Department may seek to recover unallowable costs based on a review of the award, even after the award was closed. *See* 15 C.F.R. § 24.51.

F. Claim: "The Disallowance and Demand Statement of Reasons is Arbitrary and Capricious Administrative *Ipse Dixit* that Fails to Address Important Aspects of the Problem"

EOWV APPEAL

In the appeal, EOWV argues that "[t]he disallowance decision rests on two declaratory sentences that do not even address the core issue in this dispute." It further contends that the Grants Officer cannot "rely on summarily asserting that the 'OIG's conclusion' is correct." In addition, EOWV asserts that the disallowance decision largely rests on "correspondence" between NTIA and the OIG and evidence submitted by Frontier to the OIG, neither of which has been disclosed to EOWV. EOWV states that the Commerce Department canceled a call that EOWV had scheduled to engage in informal discovery, and unlawfully, arbitrarily, and capriciously denied EOWV's request for expedited processing of its FOIA request.

ANALYSIS AND CONCLUSION

As previously discussed above, the Department's determination to disallow the \$4.24 million in indirect costs and demand repayment is not arbitrary and capricious, but rather is founded on information provided by both EOWV and Frontier during and subsequent to the OIG investigation and reviewed independently by NOAA. The Grants Officer followed up on the OIG investigation and report, as required by Department's policies. *See* Departmental Administrative Orders (DAOs) 207-10 and 213-5 (requiring agency actions to follow-up on OIG findings, recommendations, questionable costs, etc. as a result of an investigation, evaluation and/or audit review). But far from rubberstamping the OIG report, the Grants Officer has relied on her own review and interpretation of the award's terms and conditions in making all determinations in this matter. It remains EOWV's burden to establish the allowability of costs claimed under the award. Any discussions that may have occurred between NTIA and OIG would neither relieve EOWV of that responsibility nor would be germane to the insufficiency of EOWV's documentation of its compliance with the terms and conditions of the award, or the reasonableness and allocability of the disallowed costs. Ultimately, the disallowance and demand statement are based on 15 C.F.R. § 24.43(a) of the Grant rules, which, as discussed in Section II.D, authorizes an agency to disallow costs if a grantee or subgrantee materially fails to comply with any term of an award.

G. Claim: "The Disallowance and Demand Contains No Materiality Finding"

EOWV APPEAL

In its appeal, EOWV argues that the Grants Officer was required to make a "materially fails" finding in order to disallow costs and that she did not make such a finding. In addition, it asserts that "the lack of 'materially fails' finding in this dispute is no mere formality because the objection here is at most a purely technical violation." EOWV contends that the Department of Commerce general provisions make clear that not every failure related to the indirect cost is material, even when the failure is of the

recipient.

ANALYSIS AND CONCLUSION

As previously discussed, the Grants Officer acted pursuant to 15 C.F.R. § 24.43(a) in disallowing \$4,705,000 of unauthorized costs associated with load processing fees and indirect costs charged by EOWV against its award. In relevant part, 15 C.F.R. § 24.43(a)(2) states that “[i]f a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may . . . [d]isallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance.” *See also* Chapter B. 05 of the DOC Financial Assistance Standard Terms and Conditions.

As an initial matter, EOWV’s incorrectly contends that 15 C.F.R. § 24.43(a)(2) requires the Grants Officer to make an explicit “materially fails” finding in order to disallow costs. This is an improper reading of the subject regulation. Nowhere in the plain language of 15 C.F.R. § 24.43(a)(2) is it required that the Grants Officer make an explicit or separate finding as to why EOWV’s failure to comply with the terms and conditions of its award constituted a material failure. Rather, by invoking this regulation, it is implicit that the Grants Officer determined, for the reasons set forth in the IRDL, that EOWV’s charging of \$4,705,000 in costs associated with load processing fees and indirect costs was a material failure to comply with the terms of its award.

Moreover, EOWV insists that its charging of load processing fees and indirect costs as well as its failure to secure the requisite budget approval are at most “technical violations” as opposed to material violations of the terms of the award. But the following factors demonstrate the materiality of EOWV’s failure to abide by the terms and conditions of its award: (i) the payment of \$4,705,000 in load processing fees and indirect costs charged by EOWV against its award is a significant amount of federal funds for which EOWV has failed to adequately account for; (ii) EOWV’s payment of load processing fees and indirect costs to Frontier had the effect of diverting federal funds authorized and budgeted for direct project costs to unauthorized and unbudgeted expenses for processing fees and indirect costs; and (iii) EOWV’s payments of processing fees and indirect costs to Frontier were in stark violation of the award’s terms and conditions, having been made without securing the required budget approval from the Grants Officer, and thereby, circumventing the Agency’s ability to accurately understand and to effectively monitor the financial aspects of the project.

In sum, the Grants Officer was properly justified in relying on 15 U.S.C. § 24.43(a)(2) in disallowing the unauthorized load processing fees and indirect costs charged against the award by EOWV.

H. Claim: “The Disallowance and Demand Contains No Appropriateness of Remedy Finding”

EOWV APPEAL

EOWV notes that 15 C.F.R § 24.43(a) allows an agency to disallow costs if doing so is “appropriate in the circumstances.” EOWV insists that this provision “calls for an exercise of discretion and for consideration of the equities in the specific circumstances of each dispute over the allowability of costs that have been expended under a federal grant award.” EOWV argues that here, “the Grants Officer failed to issue a decision that is expressly cognizant of her discretion,” despite “the ample reasons for

considering to decline to disallow in this matter.”

ANALYSIS AND CONCLUSION

Section 24.43(a) provides that the awarding agency “*may* take one or more of the following actions, as appropriate in the circumstances,” if a grantee fails to comply with any term of an award. The phrase “appropriate in the circumstances” is not language of limitation but rather authorizes the Grants Officer to take such measures that are determined to be appropriate within his or her judgment. If, for example, an award is already in close out, then the termination or suspension of that award would be a meaningless action. EOWV’s argument also overlooks the catch-all provision in section 24.43(a)(5) which allows the Grants Officer to “[t]ake other remedies that may be legally available.” Despite EOWV’s urging to the contrary, this provision does not require the agency to make a finding as a predicate to exercise the Grants Officer’s choice of remedies. In this instance, the Grants Officer determined it was appropriate under the circumstances to follow the Grant Rules and disallow all or part of the costs based on EOWV using grant funds to pay for indirect costs. Such a determination is further supported by DOC DAOs 207-10 and 213-5, which require agencies to follow up on OIG findings, recommendations, questionable costs, etc. that stem from an investigation, evaluation and/or audit review. Simply put, a Grants Officer is entitled to disallow costs after a recipient materially fails to comply with the terms of the award and need not express her “reasons for considering to decline to disallow.”

I. Claim: “The Disallowance and Demand of \$4.24 Million Is So Excessive It Is Unreasonable and Unconstitutionally Punitive”

EOWV APPEAL

In its appeal, EOWV asserts that the Grants Officer and OIG have not identified any harm to the Federal government or substantively unreasonable reimbursement to Frontier. In addition, EOWV argues that the disallowance is excessive and should be overturned.

ANALYSIS AND CONCLUSION

Again, EOWV avers a standard that is not required. The Department’s decision to seek repayment of unallowable costs is based on the specific terms and conditions applicable to the BTOP award, terms which EOWV accepted and with which EOWV was required to comply. As previously discussed, section 24.43(a) of the Grant Rules permit the Grants Officer to disallow all or part of the cost of the activity or action not in compliance. 15 C.F.R. § 24.43(a); *see also* 31 U.S.C. 3711(a) (stating that the head of an agency “shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency”). Neither the Grants Officer nor OIG have any obligation “to identify any harm to the Federal government or substantively unreasonable reimbursement to Frontier” before enforcing the terms of the grant and disallowing indirect costs that had not been approved in accordance with the terms of that agreement.⁶ Furthermore, the injury to the Government is manifest where over \$4.7 million in federal funds were taken and used for purposes not authorized under the award; the Federal government is seeking only the recovery of these funds.

⁶ Even if such harm is required, EOWV’s material failure to comply with the terms of its award would indeed trigger harm to the Federal government given its role as the steward of taxpayer funds.

J. Claim: “The Disallowance and Demand Is Arbitrary and Capricious Disparate Treatment”

EOWV APPEAL

EOWV asserts that it is being treated differently by the Department than any other BTOP grantee. It points out that the OIG conducted a review of 54 subrecipients of grants receiving \$850 million but the OIG did not review other subrecipients’ reimbursements for indirect costs. EOWV argues that such disparate treatment by the Department is arbitrary and capricious action.

ANALYSIS AND CONCLUSION

EOWV’s argument that the Department singled it out is not merited. OIG’s investigation began after a private party filed a complaint in federal court, alleging that Frontier had falsely claimed unallowable indirect and inflated costs. As previously discussed in Section II.B., the OIG referred the matter to NTIA and NOAA for appropriate action after concluding its investigation of the grant. DAOs 207-10 and 213-5 require an agency to follow up on OIG findings, recommendations, questionable costs, etc. that stem from such an investigation. After NTIA and NOAA reviewed the ROI and other information provided by EOWV, the Grants Officer decided to disallow the costs and establish a debt for the disallowed costs.

K. Claim: The State Requests an Evidentiary Hearing Before an Administrative Law Judge.

EOWV APPEAL

In its appeal, EOWV requests an evidentiary hearing and the opportunity for testimony concerning the discussions between EOWV officials and NTIA as to this dispute. In addition, it requests that the hearing be referred to an Administrative Law Judge. It asserts that if the Department does not permit live testimony, then EOWV’s contemporaneous records should be credited and asks that the OIG’s discussion of an NTIA official’s “inconsistent and self-serving” statements to the OIG investigator be excluded from any and all consideration in connection with this matter.

ANALYSIS AND CONCLUSION

This enforcement action originates pursuant to 15 C.F.R. § 24.43, which provides that “the awarding agency will provide the grantee or subgrantee an opportunity for such a hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.” 15 C.F.R. § 24.43(b). The grantee has not indicated any statute or regulation that would entitle it to an evidentiary hearing and the opportunity to take testimony.

NTIA and NOAA’s administrative audit resolution process and debt collection process, applicable to the current debt, are governed by Chapters D and E of the DOC Financial Assistance Standard Terms and Conditions, dated March 2008. The Department’s rules for Debt Collections are found in 15 C.F.R. Part 19-Commerce Debt Collection. These rules do not provide for an in-person evidentiary hearing or the employ of an Administrative Law Judge to address disputes of the nature at issue here.

Moreover, the NTIA official’s statements to the OIG investigator have not been taken into consideration

in rendering this determination. As stated previously, it is the Grants Officer, not NTIA officials, who interprets grant rules and conditions and is charged with administering the award.

L. Claim: The Goes Affidavit Does Not Support the Disallowance and Demand.

EOWV APPEAL

In the appeal, EOWV argues that the Department should not consider an affidavit by Ms. Kelley Goes, a former employee of the State of West Virginia, for this matter because OIG and the Grants Officer did not consider it. EOWV asserts that Ms. Goes made her statements under duress because she was trying to extricate herself from the *qui tam* litigation. EOWV also asserts that her statement does not address subrecipient indirect costs.

ANALYSIS AND CONCLUSION

The Department's conclusions in the IRDL were not dependent upon Ms. Goes's affidavit.

III. Combined Summary of Financial Resolution

No Changes Made Due to Appeal Determination (Period of February 1, 2010 to December 31, 2013)

Total Federal Funds Disbursed to EOWV During the Entire Award Period:	\$124,374,998.75
Total Costs Claimed for Entire Award Period:	\$124,374,998.75
Indirect Cost Questioned by OIG for Invoice Processing:	(\$465,000)
Indirect Cost Questioned by OIG for Loading Charges:	(\$4,240,000)
Adjustment:	
Total Cost Questioned Costs Accepted by NOAA:	<u>\$0</u>
Federal Funds Allowed:	\$119,669,998.75
Refund Due to NIST:	<u>\$4,705,000</u>